United States Postal Service *and* Philadelphia PA area Local American Postal Workers Union, a/w American Postal Workers Union, AFL–CIO. Case 4–CA–18057–P

September 30, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On September 25, 1990, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, an opposition to Charging Party's and Intervenor's motion to strike certain exceptions, and a response to General Counsel's answer to Respondent's exceptions and to the General Counsel's motion to strike. The General Counsel filed cross-exceptions with a supporting brief and an answer to the Respondent's exceptions, an opposition to the Respondent's request to attach appendix to its brief in support of exceptions and a motion to strike portions of the brief, and a motion to strike Respondent's response to the General Counsel's answer to Respondent's exceptions. The American Postal Workers Union, AFL–CIO filed a motion to intervene. The Charging Party and Intervenor filed an answering brief, an opposition to the Respondent's request to attach appendix to its brief in support of exceptions and a motion to strike appendix and portions of brief, a motion to strike certain of the Respondent's exceptions, a reply to the Respondent's opposition to their motion to strike certain exceptions, and a motion to take official notice.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in the light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.

The national collective-bargaining agreement between American Postal Workers Union and the Respondent provides, under article 15, for a four-step grievance procedure, with arbitration as the fourth step, and sets specific time limits for the processing of grievances through each step, as described by the judge in footnote 3 of his decision. The unfair labor practices found here result from the continuous failure of the Respondent to process grievances as prescribed in the agreement, thus causing a logjam of grievances filed as long ago as 1986.

In the remedy section of his decision, the judge found that because of the Respondent's unwillingness or inability to process grievances within the time limits set forth in article 15 of the national agreement, an extraordinary remedy was necessary. He therefore ordered, inter alia, that the Respondent adjust all pending and future grievances, not processed within the contractual time limits, in favor of the grievant, thereby waiving any objections to the merits of the grievance. The judge's remedy also provided that these pending grievance matters could be appealed within 30 days of the effective date of his order to the Regional Director to determine if the presumed waiver of the Respondent's position would result in an unduly prejudicial or harsh result.

Both the Respondent and the General Counsel have excepted to these provisions of the judge's remedy, contending that the remedy, in effect, adds a new, substantive provision to the national agreement, and is beyond the authority of the Board, citing *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). In addition, the General Counsel contends that it is inappropriate to vest in the Regional Director the authority to determine if a given remedy is unduly harsh or prejudicial. We agree that the judge's remedy is inappropriate. We also

[1] The General Counsel and the Charging Party moved to strike the appendix attachments to the Respondent's brief in support of exceptions. This appendix contains an affidavit, copies of prior contract negotiation proposals of the American Postal Workers Union, and a copy of a United States General Accounting Office report of testimony before the House of Representatives Subcommittee on Employment and Housing, Committee on Government Operations. We grant the motion as this material was not introduced as evidence at the hearing and is not part of the record in this proceeding. See Sec. 102.45 of the Board's Rules and Regulations. Member Devaney would deny the motion to strike but would find the materials included in the appendix irrelevant to the issues in this proceeding.

The American Postal Workers Union's motion to intervene is granted.

The Charging Party's and Intervenor's motion to strike certain of the Respondent's exceptions is denied.

The General Counsel's motion to strike the Respondent's response to the General Counsel's answer to the Respondent's exceptions is denied. See Sec. 102.46(h) of the Board's Rules and Regulations, as amended, September 27, 1991.

The Charging Party's and Intervenor's motion to take official notice is denied.

[2] The Respondent has excepted to the judge's finding that the Charging Party is a labor organization, apparently because the American Postal Workers Union, AFL–CIO is the collective-bargaining representative of its employees with whom it has a national agreement. The Respondent admits, however, that the Local is an agent of the National Union (although it contends a very limited agency exists). It is also undisputed that the Local has the authority to initiate and process grievances through the first two steps of the grievance procedure. Further the Charging Party and the Respondent are parties to a memorandum of understanding covering local terms and conditions of employment, authorized under the national agreement. We therefore find that the Charging Party is a labor organization within the meaning of Sec. 2(5) of the Act. Moreover, the Respondent has not contended that its failure to process grievances within the time limits prescribed in the agreement was because the Local was not a labor organization, or that the Local was not a proper party to this proceeding.

agree with the judge, however, that an extraordinary remedy is required to alleviate the backlog of grievances caused by the Respondent's unlawful actions.[3] In fashioning the following amended remedy, we have drawn extensively from the General Counsel's proposed remedy.

Our remedy is tailored to correct the horrendous logjam in the grievance/arbitration process created by the Respondent's unfair labor practices. Among other things, this remedy provides time limits under which the Respondent will be required to meet with the Union to resolve grievances at steps 2 and 3; requires the Respondent to consider grievances by assigned category for more efficient resolution; directs the Respondent to answer unresolved grievances within certain time limits; and, in consideration of the need to expedite the large number of contractual grievances[4] that are pending, permits the Union to bypass step 3 and proceed directly to arbitration. To further improve grievance processing, our remedy requires that steps 2, 3, and arbitration hearings be held within certain time limits that we have imposed to correct the grievance logjam created by the Respondent's unlawful action.

The relief we provide is procedural. We do not intrude into the parties' substantive decision making with respect to grievance resolution. Cf. *H. K. Porter Co. v. NLRB*, supra.[5] We do require that the Respondent attempt to resolve grievances in good faith, which is what is required by Section 8(a)(5) and Section 8(d) of the Act.

REMEDY

Having found that Respondent has engaged in unfair labor practices, the Respondent will be ordered to cease and desist and to take the following affirmative action.

Grievances now awaiting action at step 2 of the grievance procedure will be processed in the following manner:

(a) *Step* 2. (i) The Respondent and the Union will meet within 30 days of the date of the Board's Order to cross-reference and exchange information in order to identify all grievances not yet heard at step 2, and those that have been heard but not yet answered as of that date. The Union will separate the grievances into class action and individual grievances, and will identify those grievances that raise disciplinary issues and those that involve contractual issues.

(ii) The Union will sort contractual grievances awaiting step 2 hearing into categories based on the type of issue and contractual violation alleged. Once the grievances have been sorted, the Union will designate those contractual grievances it claims are governed by prior arbitration awards and settlements at the local, regional, or national level. The Respondent will then promptly meet with the Union and in good faith seek to resolve all grievances so designated by the Union.

(iii) All remaining contractual grievances involving the same or similar issue will be heard together, according to the priority established by the Union. Such step 2 hearings will be held within 30 days of the date of the completion of the Respondent's and Union's efforts to resolve the grievances described in subparagraph (a)(ii) above. For those grievances not resolved at the step 2 hearing, answers must be provided by the Respondent within 30 days of the hearing.

In the event that any grievance or group of grievances cannot be resolved at step 2, the Union will have the right to bypass step 3 and certify the grievance or group of grievances for arbitration. Grievances so certified will be scheduled for arbitration and heard by an arbitrator within 90 days of the certification.

(iv) The Union will also assign all disciplinary grievances awaiting step 2 hearing into categories based on the type of discipline imposed and the basis for the discipline (e.g., attendance-policy violations). Once these designations have been made, all pending grievances involving the same or similar issues will be heard together, in accordance with a priority list established by the Union. These step 2 hearings will be held within 90 days of the date of the Board Order. For those grievances not resolved at the step 2 hearing, answers must be provided by the Respondent within 30 days of the hearing.

(v) For grievances that have been heard as of the date of the Board's Order, but not yet answered, the Union will make the same designations referred to above in subparagraphs (ii), (iii), and (iv). All these grievances, contractual and disciplinary, must be answered by Respondent within 30 days of the Union's designation. The Union will have the right to certify for arbitration those contractual grievances not resolved within that time in the manner described above in subparagraph (iii).

(vi) The Respondent will take whatever steps are necessary, including the assignment of additional per-

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[3] See *J. P. Stevens & Co.*, 157 NLRB 869, 878–879 (1966), enfd. as modified 380 F.2d 292 (2d Cir. 1967), cert. denied 389 U.S. 1005 (1967).

[4] Contractual grievances, as distinguished from disciplinary grievances, are those arising under the parties' collective-bargaining agreement, and are described as involving matters such as overtime, out of schedule pay, holidays, and withholding step increases. Disciplinary grievances involve disputes concerning , for example, letters of warning, suspensions, and notices of removal. The record shows that disciplinary grievances are given preference in scheduling over contractual grievances.

[5] The remedy imposed is only a temporary measure to correct the logjam of grievances created by the Respondent's unilateral modification of the collective-bargaining agreement's grievance procedures. It is not meant to replace the parties' agreed-upon procedure for the processing of any future grievances, and it does not require agreement by the parties concerning the merits of any grievances.

sonnel, to hear and answer all grievances within the time periods set forth above, and to ensure accurate and complete recordkeeping in its labor relations department with respect to the status of step 2 grievances.

Grievances awaiting step 3 action will be processed in the following manner:

(b) *Step* 3. (i) The Respondent and the Union will meet within 30 days of the Board Order to cross-reference and exchange information in order to identify all grievances awaiting step 3 hearing and answer. The Respondent will assign a ''regional number'' to each step 3 grievance at the time it is identified as a pending grievance, unless a number has already been assigned. The Union will separate the grievances into class action and individual grievances, and identify each as to whether it raises disciplinary or contractual issues.

(ii) The Union will sort contractual grievances awaiting step 3 hearing into categories based on the type of issue and contractual violation alleged. Once the grievances have been sorted, the Union will designate those contractual grievances it claims are governed by prior arbitration awards and settlements at the local, regional, or national level. The Respondent will then promptly meet with the Union and in good faith seek to resolve all grievances so designated by the Union. In the event that any of these grievances or group of grievances cannot be resolved at step 3, the Union may certify the grievance or group of grievances for arbitration. Grievances so certified will be scheduled for arbitration and heard by an arbitrator within 90 days of the certification.

(iii) All remaining contractual grievances involving the same or similar issue will be heard together, in accordance with the priority established by the Union. These step 3 hearings will be held within 30 days of the completion of the Respondent's and Union's efforts to resolve the grievance described in subparagraph (b)(ii) above. For those grievances not resolved at the step 3 hearing, answers must be provided by Respondent within 30 days of the hearing.

(iv) The Union will also divide disciplinary grievances awaiting step 3 hearing into categories based on the type of discipline imposed and the basis for the discipline (e.g., attendance policy violations). Once these designations have been made, all pending grievances involving the same or similar issues will be heard together, in accordance with the priority established by the Union. These step 3 hearings will be held within 90 days of the date of the Board Order. For those grievances not resolved at the step 3 hearing, answers must be provided by the Respondent within 30 days of the hearing.

(v) For grievances that have been heard as of the date of the Board's Order, but not yet answered, the Union will make the same designations referred to above in subparagraphs (ii), (iii), and (iv). All such grievances, contractual and disciplinary, must be answered by Respondent within 30 days of the Union's designation. The Union will have the right to certify for arbitration those contractual grievances not resolved within that time, in the manner described above in subparagraph (ii).

Grievances awaiting arbitration will be processed in the following manner:

(c) *Arbitration.* The Respondent will maintain the ''pre-arbitration review'' process implemented in early 1990 until all contractual grievances now pending arbitration have been discussed. The Respondent will undertake a similar good-faith review of all disciplinary grievances awaiting arbitration. Those grievances not resolved during the review will be scheduled for arbitration on completion of the review, and heard by an arbitrator within 120 days of the review, or other mutually agreed-upon date.

(d) On request, the Respondent must provide the Union with periodic reports of the status of grievances pending at steps 2 and 3, in addition to the arbitration reports already provided. The reports will include the Local Union grievance number and the ''regional number,'' if applicable, for each grievance listed.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, United States Postal Service, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the order as modified.

1. Cease and desist from

(a) Failing and refusing to process and decide steps 2 and 3 grievances and to process matters progressing to arbitration in a timely manner consistent with its obligations under article 15 of its collective-bargaining agreement with the Union.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Process all pending step 2 and 3 grievances and matters progressing to arbitration that have not been processed in accordance within the time limits of article 15 of the collective-bargaining agreement as provided in the remedy section of this decision.

(b) Process all subsequent steps 2 and 3 grievances and matters progressing to arbitration within the time limits set forth in article 15 of the collective-bargaining agreement.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all

records, reports, and other documents necessary to analyze the processing of grievances and matters going to arbitration.

(d) Post at its Philadelphia, Pennsylvania Division facilities copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER RAUDABAUGH, dissenting in part.

Although I agree with my colleagues that Respondent has violated the Act, I do not agree with the remedy that they have imposed. In my view, they have written for the parties an elaborate scheme that is at odds with what the parties themselves have agreed on. Because the Board is powerless to foist an agreement on private parties, even as a remedy for unfair labor practices,[1] I would not impose the remedy ordered by my colleagues.

In brief, the parties agreed to a multistep grievance-arbitration procedure culminating in arbitration. There are time limits for actions within each grievance step, and there are time limits between steps 1 and 2 and between steps 2 and 3. There is no time period for the holding of the arbitration hearing.

The contract provides that if the Employer fails to adhere to a time deadline at any step in the grievance procedure, the grievance ''shall be deemed to move'' to the next step.[2] The contract imposes no other procedures to govern the situation where the Employer fails to comply with a time deadline.[3] Notwithstanding this fact, my colleagues have imposed their own procedures to govern that situation. These procedures consist of new deadlines that differ from those set forth in the contract. In addition, my colleagues permit the Union to bypass step 3, notwithstanding the absence of such a procedure in the contract.

In sum, my colleagues have imposed a regimen of their own, different from that agreed upon by the parties. Under Section 8(d) and *H. K. Porter*, the Board is forbidden from doing this. My colleagues seek to avoid these statutory principles by asserting that the rules which they impose are merely procedural. Assuming arguendo that they are procedural, there is nothing in Section 8(d) or *Porter* to suggest that the Board can impose even procedural arrangements on the parties. To the contrary, time deadlines in a contract are mandatory subjects of bargaining under Section 8(d). Accordingly, under the express language of Section 8(d), these matters are to be bargained by the parties, not imposed by the Government.

My colleagues state that their remedy does not require agreement by the parties as to the merits of any grievance. I agree. However, their remedy does require a new procedure for the resolution of grievances, and this procedure differs from that agreed on by the parties.

My colleagues also state that the procedure which they impose is ''only a temporary measure.'' I think that it is clear that Section 8(d) forbids the Board to impose any modification of the agreement of the parties temporary or otherwise.

This is not to say that there can be no meaningful remedy for the violations in this case. With respect to the future, a cease-and-desist Board order and court decree, coupled with the availability of contempt sanctions, can offer protection against a recurrence of the problems that gave rise to this case. With respect to the past, there are unfortunately many grievances that have languished for far too long. As to these matters, I would order the Respondent to adhere to the contract that it has agreed to. The parties have agreed, in their contract, that they will meet ''promptly'' on grievances unresolved in step 3. If they cannot reach accord, they will proceed to arbitration ''at the earliest date possible.'' Thus, if the Union cannot achieve a satisfactory resolution of these grievances, it can force the Respondent to a prompt meeting and to prompt arbitration. Concededly, neither the Union nor the Respondent is in a position to handle this backlog all at once. With respect to this problem, I would order good-faith bargaining as to which grievances should be handled first. If Respondent drags its heels in this bargaining, contempt sanctions would be available.

I do not suggest that this approach will be a panacea. But it does offer a reasonable prospect for cleaning up the backlog and it does offer protection against a recurrence of the problem. Most importantly, my approach is consistent with the statute.

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[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[1] See *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

[2] Despite the mandatory nature of the quoted language, the evidence indicates that the Union can choose not to place the grievance into the next step.

[3] By contrast, the failure of the Union to meet a deadline results in the waiver of the grievance.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to process and decide steps 2 and 3 grievances or to process matters progressing to arbitration in a timely manner consistent with our obligations under article 15 of our collective-bargaining agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL process all pending steps 2 and 3 grievances and matters pending arbitration which have not been processed in accordance within the time limits of article 15 of the collective-bargaining agreement, as provided in the Board's decision.

WE WILL process all subsequent steps 2 and 3 grievances and matters pending arbitration within the time limits of article 15 of the collective-bargaining agreement.

UNITED STATES POSTAL SERVICE

Dona A. Nutini, Esq., for the General Counsel.
Michael Propst, Esq., of Philadelphia, Pennsylvania, for the Respondent.
Nancy Lassen, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW, JR., Administrative Law Judge. This matter was heard in Philadelphia, Pennsylvania, on February 27 through March 2, 1990. Subsequent to a requested extension of the filing date, briefs were filed by General Counsel and the Respondent. The proceeding is based on a charge filed May 8, 1989,[1] by Philadelphia, Pennsylvania. Area Local, American Postal Workers Union a/w American Postal Workers Union, AFL–CIO. The Regional Director's complaint[2] dated October 20, 1989, alleges that Respondent, United States Postal Service, violated Section 8(a)(5) and (1) of the National Labor Relations Act by unilaterally modifying the parties' collective-bargaining agreement by (1) failing and refusing to schedule step 2 and step 3 hearings within the time period set forth in the contractual grievance procedure; (2) failing and refusing to answer step 2 and 3 grievances within the time period set forth in the contractual grievance procedure; and (3) failing and refusing to assure the efficient scheduling and hearing of cases by arbitrators, as provided in the contractual grievance-arbitration procedure.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent provides postal services for the United States and operates facilities throughout the United States in the performance of that function. It admits that the Board has jurisdiction over its operations by virtue of Section 1209 of the Postal Reorganization Act. It denies that the Local Union is a labor organization within the meaning of Section 2(5) of the Act, apparently because it is the National with whom Respondent has its primary bargaining relationship, and which is designated as representative of Respondent's employees in the national agreement. This argument is inconsistent with numerous Postal Service cases, some cited subsequently herein, which have recognized the appropriateness of the status of the Local Union within a national agreement and I find that both the Local Union and National Union are included as a labor organization within the meaning of the Act.

Under the circumstances, I find that the action by Respondent and its counsel in contesting this matter is inappropriate and they are admonished to refrain from this practice in the future.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The American Postal Workers Union represents approximately 5000 clerk craft, maintenance, motor vehicle, and special delivery employees in the Philadelphia division of the United States Postal Service. Some 80 percent of these employees are located at the 30th Street General Post Office in Philadelphia. The Postal Service and the Union (APWU) are parties to a national collective-bargaining agreement currently effective for the period from July 21, 1987, to November 20, 1990. Local agreements, covering topics reserved or not specifically addressed in the national agreement, have the same expiration date. The Philadelphia Area Local, APWU, has such a local agreement, and is responsible for representing the employees in the Philadelphia division of Respondent.

Article 15 of the national agreement provides for a multistep grievance procedure, ending with binding arbitration. Grievances can be filed on behalf of individual employ-

[1] All following dates will be in 1989 unless otherwise indicated.

[2] A second case, Case 4–CA–18305–1(P), was consolidated for hearing with the instant complaint. The parties reached a non-Board settlement in that case prior to the commencement of the hearing and the complaint was withdrawn.

ees or the Local Union. Class action grievances are either grievances filed on behalf of the Union alleging contract violations, or on behalf of a group of similarly situated individual employees. The Local Unions have sole responsibility for initiating grievances, except for ''interpretive'' issues involved in the national agreement,

The national agreement provides for a four-step grievance-arbitration procedure as set out at article 15 of the national agreement.[3]

Section 3(c) of article 15 provides that failure by the Postal Service ''to schedule a meeting or render a decision in any of the Steps of [the grievance-arbitration procedure] within the time herein provided . . . shall be deemed to move the grievance to the next step of the grievance-arbitration procedure.'' While specific time limits are set forth for grievances, arbitration is to be scheduled at the ''earliest date possible.''

By letter dated March 30, 1989, to Philadelphia Postmaster Charles James, Union President Greg Bell listed 324 class action and individual (shift) tour grievances that were waiting to be heard. The list of grievances attached to Bell's letter was forwarded to tour 1 labor assistant, Charles Polk, for verification. Of the class action grievances listed, Polk admittedly had no record of 10, from 1985, 1986, and 1987. For the 1988 class action grievances, Polk found that 22 had been scheduled and heard by April 28, 1989, and that another 32 were scheduled between September 1988 and March 1989 for a hearing, but he had no way of knowing whether they had in fact been heard and it was established that the Respondent's lacked a central recordkeeping system and that only when a grievance is settled or denied is the file moved from the labor assistant cubicle to a central filing system.

General Counsel's Exhibit 16 is a list of 1647 grievances awaiting step 2 hearing, most of which dated back to 1986, 1987, 1988, and 1989. There were, however, a few from 1984 and 1985, and one from 1983. A comparison of General Counsel's Exhibit 16 with Respondent's Exhibit 10 shows that of the 1647 grievances on Exhibit 16, 56 had been resolved by June 22, 1989, and should not have been listed. Another 193 were resolved after June 22, 1989. Exhibit 15 (which list grievances waiting a step 2 decision) shows 503 grievances awaiting step 2 answers, most of which date from 1986 through 1989. A comparison of General Counsel's Exhibit 15 and Respondent's Exhibit 10 shows that 64 grievances were answered prior to June 22, 1989, and should not have been listed, and that 56 were answered after June 22.

Respondent was provided with copies of General Counsel's Exhibit 15 and 16 during the course of the investigation of the instant charges. As of October 12, 1989, after a few months of review, Respondent could not locate the files for 384 grievances listed on Exhibit 16, and 279 for grievances listed on Exhibit 15. Of those files missing in the ''waiting to be heard'' category, 161 were from 1988 and 134 from 1989. With respect to the grievances that were not answered, Respondent could not locate 132 files for 1988 grievances and 79 for 1989 grievances.

General Counsel's Exhibits 17 and 18 are updated versions of Exhibits 15 and 16 prepared by the Union in February 1990, in anticipation of the hearing, and demonstrate the continuing nature of the problem, as shown specifically in Exhibit 17 list of grievances waiting for step 2 decisions which includes:

	Employee Grievances	*Class Action Grievances*
1984	1	0
1985	4	0
1986	41	1
1987	48	19
1988	39	52
1989	231	210
1990	175	92
	539	*374

* = 913 Grievances Waiting For Step 2

Although the grievances listed in Exhibits 15, 16, 17, and 18 had been awaiting hearings or answers for well beyond the contractual time limits imposed on Respondent, the Union declined in most cases to move the grievances to step 3, as is its option under the national contract, because the Union views the step 2 discussion as necessary, both in terms of ''due process'' for an individual grievance, and because such discussion can lead to resolution of the dispute at the lowest level. In addition, lack of exchange of information and facts and a written decision at step 2 can hamper the process at step 3 (the Union has moved step 2 grievances

[3] As explained by the Postal Service at step 1 an aggrieved employee (or union representative) discusses the grievance with the employee's immediate supervisor. The discussion must occur within 14 days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause. The supervisor's decision, is required not more than 5 days after the meeting. The Union may then request the supervisor to initial a step 2 grievance form, confirming the date upon which the decision was rendered. The Union may appeal an adverse decision at step 1 to step 2 within 10 days.

When the grievance reaches step 2, the appeal form is given by the Union to the labor relations office for processing. The grievance is logged in and given to a labor relations assistant (appeals involving an employee's termination are generally handled by the labor relation's representative, a higher level employee). The grievances from a particular shift, are assigned to an assistant working on that shift who then schedules the grievance for hearing as soon as possible, but not necessarily within the 7 days provided in art. 15.

The assistant sends a scheduling letter to the Union, with available dates and a list of grievances to be heard, and a union representative is assigned to handle the matter.

If the grievance is not settled or otherwise resolved at the step 2 meeting, the assistant prepares management's answer. Art. 15, required this response within 10 days of the step 2 meeting. An appeal to step 3 must occur within 15 days of receipt of management's decision.

Step 3 appeals from the Philadelphia Division are directed to the regional director of human resources for the eastern region also located in Philadelphia. Step 3 grievances also are handled by the Union's regional representative. Cases arising out of the various divisions are also assigned for under art., representatives of the parties are to meet within 15 days after appeal to step 3 and have the authority to settle, withdraw, or grant the grievance, as appropriate, but may also return the matter to step 2 for ''full development of all facts and further consideration,'' if necessary. A written decision to the Union is required within 15 days after the step 3 meeting, unless the response time is extended by agreement of the parties. The Union then may appeal an adverse decision directly to arbitration at the regional level within 21 days of its receipt.

up to step 3, only to have them remanded back to the Union because there was insufficient information for the step 3 representatives to resolve the grievance intelligently). Finally, appealing all of the grievances currently beyond the time limits for hearing and answers at step 2 would add hundreds of cases to the step 3 docket, and if not heard and answered timely this would add to the backlog of cases awaiting arbitration, delaying final resolution of those cases for several more years.

As pointed out by the Respondent there was an increase in the number of grievances filed in 1989. The credible testimony by the Union President Bell shows that the situation worsened after the appointment of Charles James as Postmaster and it reflected an apparent reluctance or refusal by Respondent to resolve the types of grievances that had been settled under prior administrations as well as an increase in perceived violations of the contract. The number of grievances filed by the Union increased from 2600 in 1988 to 4100 in 1989. Respondent's regional and national managers were aware of the problems in Philadelphia and Respondent National Discipline Task Force Report drafted by the management representative on the task force, said that supervisors and human resource representatives responsible for resolving grievances are reluctant to do so because they ''are afraid of the repercussions.'' The report further noted that while management feels too many grievances are filed, the Union ''feel they have no alternative other then to file grievances and protest in their forum, because all lines of communication have been cut.'' In this regard the report states that management made policy changes without any union input or notification, leading to additional grievances. The recommendation of the task force included a good-faith effort by management to resolve grievances at the local level and that the labor relations staff ensure that the Union be informed far in advance of operational changes.

Delays in processing grievances at step 2 have existed for some time in Philadelphia, both in scheduling the grievances for hearing, and in rendering decisions after the hearing. Union Industrial Relations Director Bob Reid has sent numerous letters to Respondent management and labor assistants particularly beginning in 1988, requesting that grievances be scheduled for hearing and requesting decisions in cases that were heard (in these letters, the Union identified the specific grievances in question by the Union designated Local number). Despite the Union's persistence, in some cases two or even three requests were made over the course of several months for hearings involving the same grievances. Only on rare occasions did any labor assistant contact the union representative and discuss extending the time limits for either hearings or decisions.

The Union also has requested information pertinent to the grievance prior to the step 2 hearing, and in many cases such requests are denied. This in turn results in the filing of additional grievances over denial of such information, which grievances are often, but not necessarily, resolved at a separate step 2 hearing. This problem escalated in 1989, when more information requests were denied than in the past, and the Union was less successful at calling labor relations personnel and receiving the information without having to file a grievance.

Some 90 percent of the grievances denied at step 2 are appealed to step 3. The appeal is made by the Union within 15 days after receipt of the step 2 decision. At step 3 the grievance is removed from the local level, and handled by Respondent's regional director for human resources and the union regional representatives who are national business agents (NBA).

When an appeal is made a copy is sent to the Union's office, where it is logged in with a union regional number. Business Agent James Burke testified that he will call Respondent's regional representative at the beginning of each month to set step 3 hearing dates for later in the month. By the time of the actual hearing dates, both the NBAs and Respondent's representatives can hear all of the cases that were appealed during the month.

Until the fall of 1989, only grievances alleging contract violations were heard by regional level management representatives. Disciplinary cases were handled by division level management and the business agents. Because of the backlog in getting answers in discipline cases at the division level, and in an effort to get a better ''resolve'' rate, Respondent transferred the step 3 responsibility for disciplinary grievances from the divisional level to the regional level making Philadelphia the only division in the country where discipline is heard at the regional rather than the divisional level.

As many as 50 grievances can be heard at a step 3 hearing, as many are repetitive issues that have come up frequently in the past. The vast majority of contract issues at step 3 involve some sort of monetary remedy, Respondent generally fails to respond in such cases and upon denial all are appealed to arbitration by the Union. According to Burke, most of the contract issues appealed to arbitration have already been covered by prior national level arbitration awards or clear criteria spelled out in the national agreement, and therefore should never have gone beyond step 2 for resolution.

Regarding discipline cases at step 3, management has the burden of justifying the discipline imposed on the employee and the resolution rate is high on letters of warning, but if the issue becomes money in the form of backpay for suspensions or removals, the grievances are usually denied.

Respondent is obligated under the national agreement to provide a written step 3 answer within 15 days of the step 3 hearing. In most cases, the Union allows 45 days before it automatically appeal the grievance to arbitration. In divisions other than Philadelphia in the eastern region, answers in disciplinary cases heard at the divisional level usually come within that 45-day period, or sooner. In Philadelphia, however, the Union experiences delays of 6 months, and has complained about it. It also states that when step 3 answers are received they normally state only that investigation into the issue revealed a lack of fact documentation that would be necessary to support the Union's position, and therefore the corrective action requested by the Union is not granted with no further explanation given to support the denial.

In July and August 1989, the union agents in the eastern region attended step 3 hearings expecting to hear 50 or so grievances, but found Respondent's representatives did not have the files of the grievances to be heard. Respondent's representatives told the agents that they did not have the files or that no regional number had yet been assigned to the cases, a problem that had never happened before.

Business Agent Burke called Union Eastern Region Coordinator Phil Flemming and told him that something was wrong, that management did not have any files at the step 3 hearings, and that grievances were getting backed up and the system, was stopped because the grievances at step 3 could not be appealed to arbitration without the regional numbers.

At the time Burke called Flemming, Flemming received a letter from the National Union Executive Vice President Bill Burrus informing him that several of Respondent's regions have adopted a modification to the step 3 process by remanding step 3 appeals back to the divisional level for ''rediscussion.'' Flemming called Respondent's Regional Labor Relations Official Tony Suriano and asked him what was going on. Suriano admitted that step 3 grievances were being sent back to the division level to be resolved. Suriano also indicated that this remanding program was part of an effort by the Postmaster General to reduce grievances by 52 percent. Flemming told Suriano that he did not approve of or agree with the program and that any remanding had to be by mutual agreement of the parties at step 3.

On September 26, Flemming sent a letter to John Marshall, Respondent's regional manager for labor relations, protesting Respondent's ''unilateral action of remanding grievances'' in violations of article 15, section 2, step 3(b) of the national agreement which provides that the parties must mutually agree to remand step 3 appeals back to step 2. Flemming requested that the remanding program be halted.

By reply dated October 6, Marshall confirmed that Respondent's action was part of a ''grievance reduction strategy'' implemented in July 1989, which he asserted was ''communicated'' to the Union; however, Flemming had not been informed of the program's implementation except by being given a copy of a memo and he was never approached to bargain about the proposed system.

Despite Flemming's protest about the remanding system in September 1989 as late as November 24, 1989, step 3 grievances were still being remanded unilaterally by Respondent to the divisional level.

Respondent's remand or ''trapping'' program contributed to the creation of a further backlog of cases to be heard at step 3. Thus, instead of the agents being fairly current on a month-to-month basis holding hearings, by October 1989 there were more cases dating as far back as July 1989 that had not yet been heard at step 3. Also, hundreds of cases were not assigned regional numbers, and step 3 could not be bypassed by an appeal to arbitration. As of the date of the hearing, there were still 250 grievances going back as far as September 1989 that the Union had appealed to step 3 that were ''trapped'' and had still not received regional numbers.

Approximately 95 percent of the grievances denied at step 3 are appealed to arbitration. This process involves certification of the grievance for arbitration by the NBA, who notifies both management and the local union of the appeal to arbitration. Under article 15 Respondent is responsible for the scheduling of arbitrations and the designation of each grievance for regular or expedited arbitration. Grievances are also separated into removals and suspensions of 14 days or more, lesser discipline, and contract cases. For scheduling purposes, disciplinary cases take priority over contract cases, and removals take priority over lesser discipline. In Philadelphia, from the date of the step 3 appeal, removals take about 6 months to be heard at arbitration, suspensions about a year, and contract cases can take as long as 3 to 4 years.

At the time of the hearing, Philadelphia had approximately 3000 grievances pending arbitration. This is four times the number of grievances pending in any of the other eastern region divisions except Pittsburgh, in comparison to which Philadelphia had twice as many grievances pending arbitration.

III. DISCUSSION

The alleged unfair labor practices are the outgrowth of admitted management difficulty in meeting contractual ''Article 15'' time limits regarding processing of step 2 and 3 grievances and matters progressing to arbitration. Respondent's manager of labor relations for the Philadelphia Division of the Postal Service attributes the delays ''largely'' to the sheer volume of grievances, and notes that while the parties do not necessarily agree about what precipitated the increase in grievance activity in Philadelphia, there is no dispute that grievances increased dramatically in 1989.

Respondent describes various steps taken or proposed since 1988 to reduce the backlog and contends that it has made a good-faith effort to meet its contractual obligations. It argues that despite any time limit failures at step 2, step 3 and arbitration, such failures should not be found to constitute a renunciation of its collective-bargaining obligations and therefore no violation of the Act can be found. It also reasserts a position repeatedly raised at the hearing that there is no apparent remedy that can be applied to the operation of the grievance procedure itself and that therefore violations of article 15 of the national agreement are not relevant to charges against it.

The General Counsel, on the other hand, alleges that Respondent's breach of contract is so clear and flagrant as to amount to a unilateral modification of the collective-bargaining agreement and a renunciation of the bargain reached during negotiations, citing *Paramount Potato Chip Co.*, 252 NLRB 794, 797 (1980), and *Nedco Construction Corp.*, 206 NLRB 150, 151 (1973).

Although no specific argument is made relative to the following provision of article 15, section 3:

> D. It is agreed that in the event of a dispute between the Union and the Employer as to the interpretation of this Agreement, such dispute may be initiated as a grievance at the Step 4 level by the President of the Union. . . . In the event the parties have failed to reach agreement within sixty (60) days of the initiation of the grievance in Step 4, the Union then may appeal it to arbitration, within thirty (30) days thereafter.

The Respondent does refer to the Board's decision in *Postal Service*, 270 NLRB 1022 (1984). In this case the General Counsel argued that Respondent's repudiation of the grievance resolution amounted to a repudiation of the entire bargaining process, however, the Board granted a Motion for Summary Judgment and found that the allegation should be deferred to further stages of the grievance-arbitration procedure.

In this proceeding I find that there is no showing that question of interpretation of the agreement is involved. Accordingly, I find that the issue of significant violations of

bargaining agreement imposed time limits is not a matter subject to any further grievance-arbitration procedure. I further find that deferral is not appropriate in this case and that it is necessary and appropriate to resolve the question of whether Respondent's practices constitutes a violation of the Act.

It is apparent that both sides to the agreement have demonstrated some flexibility in seeking to process grievances and in making allowances pertaining to the specific time limits provided in the agreement, and I find that such prior actions do not constitute a waiver of any sort by either party.

The statistical evidence presented by the General Counsel persuasively shows that over the past several years Respondent's Philadelphia Region and Division has consistently and progressively failed to meet its contractual time limit obligations. The Postal Service clearly has been aware of the Union's concern and has been aware of serious and significant backlog problems, even though its apparent deficiencies in recordkeeping clearly have inhibited its precise awareness of the total extent of its failures.

The Local Union has made reasonable efforts to communicate its concerns to the Respondent and, despite Respondent's suggestion to the contrary, it has not made inappropriate contributions to the delay that would significantly alter the existence of the problem. Moreover, it is not incumbent upon the Union to give some lesser degree of representation to its duties to its members in order to assist Respondent in its responsibilities under the bargaining agreement.

For example, in Respondent's view, the filing of both class actions and individual grievances over the same incident is unnecessarily duplicative. Respondent admits, however, that if individual grievances were not filed and the Union were to rely only on an arbitrator's decision regarding the class action, it would refuse to apply the arbitrator's decision to the situations referred to in each individual case. Then, the Union would be time barred from addressing any of the issues as they related to affected individuals.

There is no indication that the Union was uncooperative in assisting to reducing the backlog and some progress was made in late 1988 and early 1989, with agreements to add more step 2 personnel, and with the proposed modified articles 15 and 16 provisions, however, each of these programs was eliminated or rejected when Charles James was appointed as the Philadelphia postmaster in early 1989. James' policies resulted in a significant increase in the number of grievances filed by the Union, and reflected an apparent change in Respondent's attitude toward grievances, as indicated by a lack of preparation by step 2 representatives, an increase in instances of supervisors refusing to initial grievances (which generated another grievance), refusals to provide requested information, and a perceptible reluctance and failure to settle grievances at step 2.

It also is shown that prior to mid-1989 the parties generally scheduled and heard step 3 grievances promptly, however, answers both in disciplinary and contract grievances were frequently delayed. Respondent addressed divisional delays in answering step 3 disciplinary grievances by taking responsibility for those grievances away from the Division and concentrating it at the regional level (as noted, Philadelphia is the only division in the country where disciplinary grievances are heard at the regional, rather than divisional, level).

In July 1989, Respondent unilaterally implemented a remand or ''trapping'' program, which adversely affected the step 3 hearing process as well. This was done without the consent of the Union, despite the fact that the national collective-bargaining agreement specifically states that any remand of grievances back to the local level from step 3 must be mutually agreed upon by the step 3 representatives for both parties.

Although the Union's regional coordinator proposed a prearbitration review program for Philadelphia, it was rejected by Respondent even though it had been implemented in other regions. And, as noted, the arbitration backlog tends to be adversely affected by Respondent's reluctances and failure to settle grievances at a lower step, especially such matters as apparent repetitive and clear cut contract violation.

Under these circumstances, I find that the General Counsel has demonstrated significant and continuous violations of the Respondent's duties under the time limit requirements of its collective-bargaining agreement with the Union. I further find that Respondent has failed to show mitigating circumstance for its failure to comply with or to substantially mollify the extent and effect of its failure. I conclude that the circumstances shown are sufficiently egregious to constitute a unilateral modification of its collective-bargaining agreement with the Union and I therefore conclude that it has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, as alleged, see the decision in *Paramount*, supra.

CONCLUSIONS OF LAW

1. Respondent is an employer subject to the jurisdiction of the Board pursuant to Section 1209 of the Postal Reorganization Act, 39 U.S.C. § 101, et seq.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to process and decide steps 2 and 3 grievances and process matters progressing to arbitration in a timely manner consistent with its obligations under article 15 of the appropriate collective-bargaining agreement with the Union, Respondent has unilaterally modified such agreement and has thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, it is recommended that the Respondent be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

The Postal Service has demonstrated an adamant attitude that it voluntarily will take only minimal steps to remedy its processing failures and it is clear that it is unwilling to take the steps necessary to process grievance in the timely manner specified in the bargaining agreement. It is apparent that Respondent is unwilling to voluntarily devote appropriate resources or to take other managerial actions that would tend to reduce the generation of new grievances or resolve the processing of grievances within system with due diligence and therefore a standard cease-and-desist remedy is insuffi-

cient in this instance, see *Postal Service*, 281 NLRB 215 (1986).

Respondent must accept responsibility for its wrongful failure to comply with the terms of the bargaining agreement. I consider the remedy described to be necessary to restore as nearly as possible the situation that would have prevailed if matters had processed in a timely manner. Otherwise, I find that the Respondent has merely argued that ''no'' remedy is possible and it has not met its burden of demonstrating that a remedy such as that set forth below is not appropriate, see *Rebel Coal Co.*, 259 NLRB 258 (1981).

Under the circumstances, it appears necessary to recognize a presumption or legal fiction regarding the merits of the grievances in order to remedy the grievances within the contractual time limit or otherwise induce the Respondent to take sufficient efforts to meet its obligations. Accordingly, Respondent shall be considered to have waived its objections to any step 2 or 3 grievances not processed or decided within the time provided in its bargaining agreement or arbitration matters not scheduled with all due diligence and Respondent will be ordered to adjust in favor of the grievant, all such pending and future matters that are not so processed, decided, or scheduled within the time limits. This waiver shall be subject to a provision that such waiver shall not apply in matters where the Union or grievant in the future request or otherwise causes a delay or postponement and it shall be subject (both for scheduling and deciding) to a 7-day grace period to temporarily allow for processing difficulties. Arbitration matters not scheduled within 120 days shall be considered to be beyond due diligence except matters subject to arbitration at the national level. Objection to all such grievances and arbitration matters meeting this criteria, pending on the date of this decision shall be deemed to have been waived except for any such matter that is subject to a motion to be filed within 30 days of the effective date of this decision; to the Regional Director for good cause shown (with an opportunity for a reply by the Charging Party), which is found by the Regional Director to be of such an exceptional nature that a presumed waiver of its position would result in an unduly prejudicial or unduly harsh result. Such matters shall be processed and decided with all due diligence or as otherwise established by the Regional Director.

Otherwise, it is not considered to be necessary that a broad order be issued.

[Recommended Order omitted from publication.]